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Employment Practices

Employment Practices; Hazardous Substances Information and Training Act

Labor Code §§6360, 6361, 6362, 6363, 6365, 6366, 6367, 6368, 6370, 6371, 6372, 6373, 6374, 6380, 6380.5, 6381, 6382, 6383, 6384, 6385, 6386, 6390, 6391, 6392, 6393, 6394, 6395, 6396, 6397, 6398, 6399, 6399.1, 6399.2, 6399.5, 6399.6, 6399.7, 6399.9 (new and repealed).

SB 1874 (Nejedly); STATS 1980, Ch 874

Support: AFL-CIO; California Highway Patrol; California Labor Federation; Department of Finance; Department of Industrial Relations

The Department of Industrial Relations by agreement with the Department of Health Services is responsible for establishing and maintaining a data repository on toxic materials and harmful physical agents that are, or may be in use in places of employment.¹ One function of the repository is to provide reliable data to employers, employees or their representatives, and governmental agencies concerning the potential hazards to employees caused by exposure to toxic materials in the workplace.² Chapter 874 establishes a system designed to ensure the transmission of information to employees regarding the potential dangers of hazardous substances³ by enacting the Hazardous Substances Information and Training Act (hereinafter referred to as the Act).⁴ The Act is applicable to manufacturers⁵ and sellers of hazardous substances and to employers who use these substances, in a manner that employees may be exposed to them under normal working conditions or in a reasonably foreseeable emergency in the workplace.⁶

List of Hazardous Substances

Chapter 874 requires the Director of the Department of Industrial

1. See CAL. LAB. CODE §147.2.

2. See *id.* §147.2(1).

3. See *id.* §6361(b). See generally Senator John A. Nejedly, Press Release, no. 42, Toxic Substances Legislation Approved, June 5, 1980.

4. See CAL. LAB. CODE §6360.

5. See *id.* §6386 (specified laboratories excluded).

6. *Id.* §6362. See also *id.* §6385 (Act not applicable to hazardous substances contained in products intended for consumption by employees in workplace or by the general public, or present in food sale or trade establishments other than processing or work areas).

Relations to compile a list of hazardous substances.⁷ The list will include the following substances that are presumed to be potentially hazardous by the Director:⁸ (1) substances listed by the International Agency for Research on Cancer as human or animal carcinogens;⁹ (2) substances designated by the Environmental Protection Agency as toxic or hazardous water pollutants or hazardous air pollutants having known adverse health risks;¹⁰ (3) substances listed as airborne chemical contaminants by the Occupational Safety and Health Standards Board;¹¹ (4) substances categorized by the Director of Food and Agriculture as restricted materials having known adverse health risks;¹² and (5) substances for which an information alert has been issued by the Department of Industrial Relations data repository.¹³ These substances must be included on the director's list unless it is *shown* that a particular substance as present occupationally exists in a physical state, volume, or concentration that is not potentially hazardous to human health.¹⁴ Moreover, the proposed list or any subsequent additions thereto must be submitted to the Occupational Safety and Health Standards Board for a hearing for modification and approval.¹⁵ Following the board's approval the director must adopt the list as a regulation and make it available to manufacturers, employers, and the public.¹⁶

Duties of Manufacturers, Producers, and Sellers

Chapter 874 requires a manufacturer¹⁷ of any listed hazardous substance to prepare and provide to direct purchasers of the substance a current, accurate, and complete material safety data sheet (hereinafter referred to as MSDS)¹⁸ based on information reasonably available to

7. See *id.* §6380. See also *id.* §6381 (exclusion of substance from list does not affect any other liability of employer to persons exposed to a toxic or hazardous substance). See generally *id.* §§6383 (definition of hazardous substance), 6364 (impurities which develop in chemical process but not present in final product and to which employee exposure is unlikely are not within provisions of the Act).

8. See *id.* §6382(a).

9. *Id.* §6382(b)(1).

10. *Id.* §6382(b)(2); see 33 U.S.C. §§1317(a), 1321(b) (Supp. II 1978) (Clean Water Act of 1977); 42 U.S.C. §7412(b) (Supp. II 1978) (Clean Air Act of 1978).

11. CAL. LAB. CODE §6382(b)(3); see *id.* §142.3.

12. *Id.* §6382(b)(4); see CAL. FOOD & AGRIC. CODE §14004.5.

13. CAL. LAB. CODE §6382(b)(5); see *id.* §147.2.

14. See *id.* §6382(a).

15. *Id.* §6380.5.

16. *Id.* §6380. See CAL. GOV'T CODE §§11346-11349.9 (procedure for establishing regulations); CAL. LAB. CODE §6380.5(a), (b) (the inclusion or exclusion of an individual substance is not subject to the procedural requirements of CAL. GOV'T CODE §§11346.6, 11346.7).

17. See CAL. LAB. CODE §6372 (definition of manufacturer).

18. See *id.* §6374 (definition of MSDS).

the manufacturer.¹⁹ In addition, any person other than a manufacturer who sells a hazardous substance or mixture²⁰ is required to provide direct purchasers at the time of sale with the most recent MSDS or with equivalent information if it is foreseeable that the purchaser may be subject to the provisions of the Act.²¹ The MSDS must include, if pertinent, (1) the chemical and common names of the substance,²² (2) the hazards and risks involved in the use of the substance,²³ (3) any recommended safety precautions,²⁴ (4) any emergency procedures for spills, fire, disposal, and first aid,²⁵ (5) a description in lay terms of the specific health risks posed by the substance,²⁶ and (6) the date the information was compiled and, for an MSDS issued after January 1, 1981, the name and address of the manufacturer responsible for preparing the information.²⁷ A copy of the MSDS prepared on each hazardous substance manufactured must be given to the Department of Industrial Relations.²⁸ Additionally, an MSDS must be revised on a timely basis and at least one year after new information becomes available to the manufacturer.²⁹ If significantly increased risks are indicated by subsequently obtained information, the manufacturer must provide direct purchasers of the preceeding year with that information.³⁰

An MSDS is not required if the substance is present in a physical state or concentration for which there is no valid and substantial evidence that exposure³¹ will pose an adverse risk to human health.³² Furthermore, sellers and manufacturers are relieved of the obligation to provide a *specific* purchaser with an MSDS if (1) there is a record of having provided that purchaser with the most recent MSDS,³³ (2) the product is labelled according to the Federal Insecticide, Fungicide, and Rodenticide Act,³⁴ or (3) the product is sold at retail and is incidentally

19. *See id.* §6390. *See also id.* §6392 (provision of federal OSHA Form 20 MSDS or equivalent constitutes prima facie evidence of compliance).

20. *See id.* §6373 (definition of mixture).

21. *See id.* §§6362 (persons subject to the Act), 6397(a). *See also id.* §§6395, 6397(b) (situations when a single MSDS is permitted for multiple formulations or for an entire product mixture).

22. *See id.* §6391(a). *See generally id.* §§6366 (definition of CAS number), 6367 (definition of chemical name), 6388 (definition of common name).

23. *See id.* §6391(b).

24. *See id.* §6391(c).

25. *See id.* §6391(d).

26. *See id.* §6391(e).

27. *See id.* §6391(f).

28. *Id.* §6394.

29. *See id.* §6390.

30. *See id.*

31. *See id.* §6370 (definition of exposure).

32. *See id.* §6390.

33. *Id.* §§6393, 6397(c).

34. *Id.*; *see* 7 U.S.C. §§136-136y (Supp. II 1978).

sold to an employer or his or her employees in the same form, approximate amount, concentrations, and manner as it is sold to consumers and, to the seller's knowledge, the exposure of employees is not significantly greater than that of a consumer during the principal consumer use of the product.³⁵

Duties of Employers

Chapter 874 establishes guidelines regarding an employer's duties under the Act.³⁶ On a timely and reasonable basis, an employer must provide an MSDS on substances used in the workplace to an employee, collective bargaining representative, or an employee's physician.³⁷ In addition, employees who may be exposed to a hazardous substance must be provided with the information on the substance contained in the MSDS, either in written form or through training programs.³⁸ Employers whose employees may be exposed to a hazardous substance or mixture may obtain on request an MSDS on the product from the manufacturer or producer.³⁹ If the employer fails to make written inquiry within 12 months to ascertain whether the product is a listed hazardous substance or within six months to determine whether new information is available on the product, an employee, collective bargaining representative, or an employee's physician may request the employer to do so.⁴⁰ The employer must comply with the request by making an inquiry within seven working days, and the manufacturer or producer must respond to the employer's inquiry within 15 working days of its receipt.⁴¹ If the manufacturer or producer completely fails to respond within 25 working days of the date the request was made, the employer is required to send a copy of the request to the director indicating that no response was received.⁴²

Providing the information required by Chapter 874 does not relieve employers of other obligations owed to employees exposed to toxic or hazardous substances, nor does it relieve manufacturers or producers of other duties to warn ultimate users of risks inherent in a product.⁴³ Furthermore, the discharge of, or discrimination against, an employee

35. See CAL. LAB. CODE §§6393, 6397(c).

36. See *id.* §§6398, 6399.1 (compliance with specified food and agriculture regulations constitutes compliance with employer's duties).

37. See *id.* §6398(a).

38. See *id.* §6398(b).

39. See *id.* §6399.

40. See *id.*

41. See *id.*

42. See *id.*

43. See *id.* §6399.6.

for involvement in a complaint or proceeding related to the provisions of this Act or for the exercise of any right created by this Act is prohibited.⁴⁴

Trade Secrets

Although disclosure to the director of all specified information is required,⁴⁵ Chapter 874 does afford protection from public disclosure of trade secrets⁴⁶ and of information officially certified as requiring secrecy for national defense purposes.⁴⁷ If a written request is made or proper documents are submitted by the manufacturer or producer, the director is prohibited from disclosing information designated as a trade secret to anyone except (1) state or federal employees or officers in matters related to their official duties for the protection of health, or (2) state contractors and their employees when the director believes disclosure is necessary for the performance of a contract for work related to the Act.⁴⁸ Willful disclosure of trade secrets by any party who is entitled to receive the information and who knows that disclosure is prohibited constitutes a misdemeanor.⁴⁹

Chapter 874 requires the director, on his or her own initiative or upon a request under the California Public Records Act,⁵⁰ to determine whether the information is properly designated as a trade secret.⁵¹ The employer, manufacturer, or producer must be notified by certified mail of a determination that the information is not a trade secret⁵² and must be allowed 15 days following receipt of that notification to submit a statement justifying the grounds on which the trade secret privilege is claimed.⁵³ Within 15 days of receipt of the statement, or, if no statement is submitted, within 30 days of the original notice, the director must decide whether the information will be afforded protection as a trade secret, and then must notify the employer or manufacturer and any person seeking disclosure of his or her decision.⁵⁴ Notice of denial of protection must include the date set for public disclosure, which can-

44. *See id.* §§6310 (requiring reinstatement and reimbursement of wages for employee dismissed in retaliation for involvement in a complaint, or proceeding; noncompliance constitutes a misdemeanor), 6399.7.

45. *See id.* §6396(f).

46. *See id.* §6396(a). *See generally* CAL. GOV'T CODE §6254.7(d) (definition of trade secret).

47. *See* CAL. LAB. CODE §6396(d).

48. *See id.* §6396(a), (b).

49. *See id.* §6396(c).

50. *See generally* CAL. GOV'T CODE §§6250-6265.

51. *See* CAL. LAB. CODE §6396(e)(1).

52. *See id.* §6396(e)(2).

53. *See id.* §6396(e)(3).

54. *See id.* §6396(e)(4).

not be sooner than 15 days following the mailing of final notice.⁵⁵ Until that date, the employer, manufacturer, or producer may seek a declaratory judgment in a superior court on the issue of protection from disclosure.⁵⁶ In summary, the provisions of the Hazardous Substances Information and Training Act apparently utilize the chain of commerce to transmit information regarding hazardous substances to employees who are exposed to these substances for the purpose of reducing the incidence and cost of occupational disease caused by preventable health risks in the workplace.⁵⁷

55. *See id.*

56. *See id.* §6396(e)(5).

57. *See id.* §6361.

Employment Practices; mandatory sterilization

Government Code §12945.5 (new).

AB 290 (M. Waters); STATS 1980, Ch 619

Support: Department of Fair Employment and Housing; Planned Parenthood

Existing law provides that it is an unlawful employment practice, unless based upon a bona fide occupational qualification,¹ for an employer to discriminate against any person on the basis of sex² or because of pregnancy, childbirth, or other related medical condition.³ Chapter 619 additionally makes it an unlawful employment practice for an employer to require any employee to be sterilized as a condition of employment.⁴

It appears that Chapter 619 was engendered in response to an Occupational Safety and Health Administration citation issued to the American Cyanamid Company⁵ charging that the company had adopted a policy requiring women employees to be sterilized before working with certain toxic substances.⁶ By prohibiting California employers from adopting such a policy,⁷ Chapter 619 will ostensibly pressure businesses

1. *See* 1 A. LARSON, EMPLOYMENT DISCRIMINATION, *Sex*, §§13-17 (discussion of bona fide occupational qualification exceptions). *See, e.g., id.* §§14.10 (physical sex features required for employment as a wet nurse), 14.20 (employment of an actor or actress requires a particular sex to achieve authenticity), 14.30 (employment of a restroom attendant requires a particular sex to satisfy conventional standards of decency and privacy).

2. *See* CAL. GOV'T CODE §12940.

3. *See id.* §12945.

4. *See id.* §12945.5.

5. *See* 9 OCCUPATIONAL SAFETY & HEALTH REPORTER (BNA) 467-68 (1979); Assemblywoman Maxine Waters, Press Release, no. 111, July 11, 1980.

6. *See* 9 OCCUPATIONAL SAFETY & HEALTH REPORTER (BNA) 467-68 (1979).

7. *See* CAL. GOV'T CODE §12945.5.

into improving the working environment for all persons by eliminating reproductive hazards.⁸ If women employees of child-bearing age are determined to be susceptible to reproductive hazards when men are not,⁹ employers may be faced with a dilemma: either protect women employees from potentially hazardous areas as required by law¹⁰ or provide them with equal employment opportunities.¹¹

8. See Assemblywoman Maxine Waters, Press Release, no. 111, July 11, 1980.

9. The premise that women are hypersusceptible to reproductive hazards has been challenged as an unwarranted assumption. See generally, Comment, *Employment Rights of Women In the Toxic Workplace*, 65 CALIF. L. REV. 1113, 1117-18 (1977); Comment, *Exclusionary Employment Practices in Hazardous Industries: Protection or Discrimination?*, 5 COLUM. J. ENV'T L. 97, 99-102 (1978).

10. See 29 U.S.C. §645(a) (1976) (stating purpose of Occupational Safety & Health Act).

11. Compare *id.* with 42 U.S.C. §2000(e) (1976) (Civil Rights Act of 1964); CAL. GOV'T CODE §12940. See generally Comment, *Employment Rights of Women In the Toxic Workplace*, 65 CALIF. L. REV. 1113, 1114, 1122 (1977); Comment, *Exclusionary Practices in Hazardous Industries: Protection or Discrimination?*, 5 COLUM. J. ENV'T L. 97, 140-41 (1978).

Employment Practices; unemployment insurance disability benefits

Unemployment Insurance Code §2627.7 (new); §§2627, 2627.3, 2627.5, 2629 (amended).

AB 2437 (Filante); STATS 1980, Ch 1162

Support: Department of Employment Development; Department of Finance

SB 1857 (Greene); STATS 1980, Ch 1040

Support: Department of Industrial Relations

Opposition: Department of Employment Development; Department of Finance

Existing law provides that a disabled individual applying for unemployment disability insurance benefits is eligible to receive benefits only if he or she has been disabled and unemployed for a waiting period of seven consecutive days during which no benefits are paid.¹ This waiting period may be waived, however, if the disabled individual is confined to a hospital for at least one day.² Under prior law, this waiting period could also be waived if the person was unemployed and disabled for more than 49 days prior to application for the benefits.³ Chapter 1040 changes the number of days required for this waiver from 49 to 21.⁴

1. See CAL. UNEMP. INS. CODE §2627.

2. See *id.* §2627.5.

3. See CAL. STATS. 1979, c. 1049, §2, at — (enacting CAL. UNEMP. INS. CODE §2627.3).

4. See CAL. UNEMP. INS. CODE §2627.3.

In addition, Chapter 1162 extends the waiver of the seven-day waiting period to any individual who, pursuant to an order from a physician,⁵ is treated in a hospital surgical unit⁶ or a surgical clinic⁷ that requires a stay of less than 24 hours, provided that the person is disabled as a result of the treatment for a period of eight days or more during the disability benefit period.⁸ Chapter 1162, however, specifically excludes the office of a private physician⁹ from qualifying as a surgical clinic.¹⁰ To qualify for the waiver provided by Chapter 1162, the application must be supported by (1) a certificate from an appropriate official of the hospital or clinic stating the day the person received treatment,¹¹ (2) a certificate from the individual's physician stating that the individual is disabled for eight days or more as a result of the treatment,¹² and (3) the certificate that accompanies a first claim for benefits.¹³

Existing law provides that if a disabled individual is qualified to receive *both* disability insurance benefits and certain "other benefits"¹⁴ on any day of unemployment and disability, he or she may not receive disability insurance benefits unless the amount of the other benefits is less than the amount the disabled individual would be entitled to receive as disability insurance.¹⁵ If the "other benefits" for any day are less than the disabled individual is entitled to receive as disability insurance, the person would be entitled to the difference between the amount of disability insurance benefits and the amount received as other benefits.¹⁶ Prior to Chapter 1040, however, the maximum amount of disability insurance benefits payable to a disabled individual was reduced by the amount of other benefits the individual had received, or was entitled to receive, during the same period of disability.¹⁷ Chapter 1040 deletes this reduction and allows a disabled individual to receive both disability insurance benefits and workers' compensation

5. See *id.* §2627.7(c)(4). See generally CAL. LAB. CODE §3209.3 (definition of physician).

6. See CAL. UNEMP. INS. CODE §2627.7(c)(3) (definition of surgical unit).

7. See *id.* §2627.7(c)(2) (definition of surgical clinic). See generally CAL. HEALTH & SAFETY CODE §§1205, 1206 (licensing requirements and exemptions).

8. See CAL. UNEMP. INS. CODE §2627.7(a). See generally *id.* §2608 (definition of disability benefit period).

9. See CAL. LAB. CODE §3209.3 (definition of physician).

10. See CAL. UNEMP. INS. CODE §2627.7(c)(2). See generally CAL. HEALTH & SAFETY CODE §§1205, 1206 (licensing requirements and exemptions); CAL. UNEMP. INS. CODE §2627.7(c)(3).

11. See CAL. UNEMP. INS. CODE §2627.7(b)(1).

12. See *id.* §2627.7(b)(2).

13. See *id.* §2706.1.

14. See *id.* §2629(b) (definition of "other benefits").

15. See *id.* §2629(a), (c).

16. See *id.* §2629(c).

17. Compare *id.* §2629(c) with CAL. STATS. 1973, c. 86, §2, at 147. See generally *Martin v. California Dep't of Employment*, 28 Cal. App. 3d 804, 806-08, 105 Cal. Rptr. 111, 112-13 (1972).

payments without reducing the maximum disability insurance by the amount of the “other benefits” once the person is determined to be *permanently* disabled under workers’ compensation law.¹⁸

18. Compare CAL. UNEMP. INS. CODE §2629(c) with CAL. STATS. 1973, c. 86, §2, at 147. See generally 28 Cal. App. 3d at 806-08, 105 Cal. Rptr. at 112-13; CAL. UNEMP. INS. CODE §2629(b).

